Wong Kim Wah (trading as 'Syarikat Binaraya') v The Government of the State of Pahang & Anor

HIGH COURT (KUANTAN) — CIVIL SUIT NO 479 OF 1985
HELILIAH MOHD YUSOF J
23 APRIL 2004

Civil Law Act — Assignment — Absolute assignment — Assignment of specified part of debt — Whether absolute — Civil Law Act 1956 s 4(3)

The Government of the State of Pahang ('the defendant/debtor') entered into an agreement ('the main contract') with Philippines Nation Construction Corporation ('the third party/assignor') for the construction of a certain project. By a subsequent agreement, the third party/assignor sub-contracted a portion of the works to be undertaken by it under the main contract to the plaintiff/assignee. At the same time, the third party/assignor and the plaintiff/assignee also entered into an agreement entitled 'the Assignment of Receivables' ('the assignment') whereby the third party/assignor agreed to assign to the plaintiff/assignee any moneys 'which are now or may hereafter be due and payable to the Assignor under the said Main Contract specifically in respect of the 'Sub-Contract Works' subject to certain terms and conditions stipulated therein'. Thereafter, a notice was given to the defendant/debtor concerning the assignment. The third party/assignor also sought the defendant/debtor's consent to the assignment, as required under the main contract. The defendant/debtor replied stating that it had no objections to the 'partial' assignment.

The question before the court pursuant to certain previous court orders was on the interpretation of the assignment. The plaintiff/assignee's contention was that the assignment was a legal assignment in accordance with s 4(3) of the Civil Law Act 1956 ('the Act') as: (a) it was in writing; (b) notice in writing of the assignment had been given to the defendant/debtor; and (c) the assignment was absolute. The defendant/debtor, on the other hand, contended that the assignment was not a legal assignment as it was not absolute.

The assignment contained the following provisions '... in consideration of the foregoing premises, Assignor hereby assigns in assignment, the right to receive directly from the Pahang Government all payments as and when they become due and payable by the Pahang Government to the Assignor under the provisions of the Main Contract with reference to the aforesaid Subcontract Works from time to time to the extent of M$7,939,313.25 (hereinafter called 'the Payment') which sum is only provisional and subject to variations as provided for in the Main Contract ...'.

Held:

(1) The assignment was not an absolute assignment of an unpaid balance of a debt. Rather, it was an assignment of a specified part of a debt (see para 22).

(2) In the instant case, it could not be said that the defendant/debtor would be able to find out, based on documents in its possession, whether the sole right to the debt was that of the third party/assignor

as the defendant/debtor would not be able to ascertain whether there was still anything owed by the third party/assignor to the plaintiff/assignee. The defendant/debtor would have to investigate the state of accounts between the third party/assignor and the plaintiff/assignee to ascertain whether there was still anything owed by the third party/assignor to the plaintiff/assignee. In the same manner, if the plaintiff/assignee were to sue the defendant/debtor, the court would not be able to ascertain to whom the defendant/debtor should pay without further investigating the state of the accounts (see paras 23 and 24).

(3) Accordingly, the assignment was not an absolute assignment within the provision of s 4(3) of the Act. Since it was an equitable assignment, the plaintiff/assignee was not entitled to bring an action against the defendant/debtor without the need of joining the third party/assignor (see para 26).

[Bahasa Malaysia summary

Kerajaan Negeri Pahang ('defendan/penghutang') telah membuat perjanjian ('kontrak utama') dengan Philippines Nation Construction Corporation ('pihak ketiga/penyerahhak') untuk satu projek pembinaan. Dalam perjanjian yang seterusnya, pihak ketiga/penyerahhak telah subkontrak sebahagian dari kerja-kerja yang diberikan kepadanya kepada kontraktor yang lain (plaintif/pemegang serahhak). Pada masa yang sama pihak ketiga/penyerahhak dan plaintif/pemegang serahhak juga bersetuju untuk menandatangani perjanjian yang lain yang dikenali sebagai 'the Assignment of Receivables' di mana pihak ketiga/penyerahhak telah bersetuju menyerah hak wang yang 'which are now or may hereafter be due and payable to the Assignor under the said Main Contract specifically in respect of the 'Sub-Contract Works' subject to certain terms and conditions stipulated therein. Selepas itu, satu notis berkenaan penyerahan hak telah disampaikan kepada defendan/penghutang. Pihak ketiga/penyerahhak juga telah meminta persetujuan defendan/penghutang untuk penyerahan hak, yang dikehendaki di bawah kontrak utama. Defendan/penghutang menyatakan bahawa ia tidak mempunyai bantahan terhadap 'sebahagian' penyerahan hak.

Persoalan di hadapan mahkamah berdasarkan perintah-perintah mahkamah terdahulu adalah mengenai tafsiran penyerahan hak. Plaintif/pemegang serahhak telah menegaskan bahawa penyerahan hak tersebut adalah sah dari segi undang-undang dan menurut s 4(3) Akta Undang-Undang Sivil ('Akta tersebut') kerana: (a) ianya secara bertulis; (b) notis bertulis penyerahan hak tersebut telah diserahkan kepada defendan/penghutang; (c) penyerahan hak tersebut adalah mutlak. Defendan/penghutang, sebaliknya, mendakwa bahawa penyerahan hak tersebut bukanlah penyerahan hak yang sah kerana ia tidak mutlak.

Penyerahan hak tersebut mengandungi peruntukkan berikut '… in consideration of the foregoing premises, Assignor hereby assigns in assignment, the right to receive directly from the Pahang Government all payments as and when they become due and payable by the Pahang Government to the Assignor under the provisions of the Main Contract with reference to the aforesaid Subcontract Works from time to time to the extent of M$7,939,313.25 (hereinafter called 'the Payment') which sum is only provisional and subject to variations as provided for in the Main Contract ...'.

Diputuskan:

(1) Penyerahan hak tersebut bukanlah penyerahanan hak mutlak untuk hutang yang tidak dibayar. Sepatutnya, ia adalah penyerahan hak untuk sebahagian hutang tersebut (lihat perenggan 22).

(2) Dalam kes ini, tidak boleh dinyatakan bahawa defendan/penghutang dapat mengenal pasti, berdasarkan dokumen-dokumen di dalam simpanannya, sama ada hak tunggal terhadap hutang tersebut adalah dari pihak ketiga/penyerahhak kerana defendan/penghutang tidak dapat memastikan sama ada apa-apa lagi yang terhutang oleh pihak ketiga/penyerahhak kepada plaintif/pemegang serahhak. Defendan/penghutang mestilah menyiasat keadan akaun-akaun di antara pihak ketiga/penyerahhak dan plaintif/pemegang serahhak untuk memastikan sama ada masih ada wang yang belum dibayar oleh pihak ketiga/penyerahhak kepada plaintif/pemegang serahhak. Dalam cara yang sama, jika plaintif/pemegang serahhak menyaman defendan/penghutang, mahkamah tidak boleh memastikan kepada siapa defendan/penghutang patut membayar hutang tersebut tanpa menyiasat terlebih dahulu keadaan akaun (lihat perenggan 23 and 24).

(3) Justeru itu, penyerahan hak tersebut bukanlah penyerahan hak yang mutlak di dalam peruntukan s 4(3) Akta tersebut. Memandangkan ini merupakan satu penyerahan hak ekuiti, plaintif/pemegang serahhak tidak boleh membawa tindakan terhadap defendan/penghutang tanpa perlu melibatkan pihak ketiga/penyerahhak (lihat perenggan 26).]

Notes

For a case on absolute assignment, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 2618.

Cases referred to

Arab-Malaysian Merchant Bank Bhd v Boustead Trading (1985) Sdn Bhd [1994] 1 MLJ 624 (refd)
BP (Sabah) Sdn Bhd v Sharikat Jubrin Enterprise [1998] 4 MLJ 725 (refd)
Hughes v Pump House Hotel Ltd [1902] 2 KB 270 (refd)
Khaw Poh Chuan v Ng Gaik Peng & Ors [1996] 1 MLJ 775 (refd)
Malayan Banking v PK Rajamani [1994] 1 MLJ 405 (refd)
Malayawata Steel Bhd v Government of Malaysia & Anor [1980] 2 MLJ 103 (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)

Shahul Hameed Amirudin (Noreene Abd Hamid with him) (Zul Rafique & Partners) for the plaintiff
Mahiran Md Isa (Senior Federal Counsel) for the defendants
Vignesh Kumar (Balendran Chong & Bodi, Kuantan) for the third party

Heliliah Mohd Yusof J:

[1] The question before the court pursuant to certain previous orders made on 10 March 1999 (Encl 69] and 17 April 2003 is on the interpretation of an agreement dated 17 August 1982 whereby there was assigned to the Plaintiff certain receivables. At this stage of the proceedings there have not been filed any agreed facts but there are relevant documents on the issue of the relationship between the plaintiff and the defendant. The following are the salient documents:

1. On 9 June 1980 – there was concluded between the Defendant and the Third Party a Contract No S/PHG 114/80 – referred to as 'the Main Contract';

2. By an agreement dated 17 August 1982, the Third Party sub-contracted a portion of the works undertaken by the Third Party under the Main Contract to the Plaintiff;

3. On the same date, ie 17 August 1982, the Third Party and the Plaintiff concluded another agreement intituled 'the Assignment of Receivables' whereby the Third Party as Assignor agreed to assign to the Plaintiff as assignee any moneys 'which are now or may hereafter be due and payable to the Assignor under the said Main Contract specifically in respect of the 'Sub-Contract Works' subject to certain terms and conditions stipulated therein (or Assignment of Receivables);

4. On 12 August 1982, a notice was given to the Defendant concerning the assignment with which was enclosed a copy of the assignment and, at the same time, seeking the Defendant's consent. The consent sought appears to be in consonance with the provisions of the Main Contract which provide, inter alia:

> 3. The Contractor shall not assign the Contract or any part thereof or any benefit or interest therein or thereunder (otherwise than by a charge in favour of the Contractor's Bankers of any monies due or to be become due under this Contract) without the prior written consent of the Employer.
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> 4. The Contractor shall not sub-let the whole of the Works. Except where otherwise provided by the Contract the Contractor shall not sub-let any part of the Works without the prior written consent of the Engineer (which shall not be unreasonably withheld) and such consent if given shall not relieve the contractor from any liability or obligation under the Contract and he shall be responsible for the acts, defaults and neglects of any sub-contractor, his agents, servants or workmen as fully as if they were the acts, defaults or neglects of the Contractor, his agents, servants or workmen. Provided always that the provision of labour on a piecework basis shall not be deemed to be a sub-letting under this clause.

[2] By a letter dated 12 August 1982, a letter was sent by the Third Party to the Director of Public Works Department, Pahang requesting concurrence for the assignment. Curiously enough, while the letter was dated 12 August 1982, the letter stated as follows:

> We attach herewith duly executed copies of our Assigment of Receivables

[3] However, as noted above, the agreed copies of the Assignment were dated 17 August 1982. The consent was subsequently obtained apparently by a letter dated 28 August 1982, R/20/2/2/3 21.1(174) where it is stated, inter alia, that 'JKR Pahang has no objection to your proposal of partial assignment of the contract Trunk Roads Pahang – Contract Package B Contract.' The issue that I have to decide is on the legal effect of the Assignment of Receivables. The plaintiff is relying on s 4(3) of the Civil Law Act 1956:

> 4(3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[4] In pursuance of this section, counsel for the Plaintiff contends that the three elements to be satisfied in order to create a legal assignment are:

(i) the assignment must be in writing;

(ii) that notice in writing of the assignment must be given to the debtor; and

(iii) that the assignment must be absolute.

[5] It is noted that the defendant has not disputed the existence of the first two elements. However, it would appear that counsel for the plaintiff and the defendant are at variance on the third essential element, that is, that the assignment must be absolute and not purport to be by way of a charge only. For this purpose, counsel for the plaintiff has relied on the decision in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 and more particularly at pp 269–271 and *Hughes v Pump House Hotel Ltd* [1902] 2 KB 270. The Federal Court in *Nouvau's* case rendered an instructive judgment, beginning at p 268, which elucidates the Malaysia position:

> As is well known, an ordinary debt or chose in action before the Judicature Act 1873 was not assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue in equity. In his suit in equity the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the original creditor, party in order primarily to bind him and prevent his suing at law, and also to allow him to dispute the assignment if he thought fit. This was *a fortiori* the case where the assignment was by way of security, or by way of charge only because the assignor had a right to redeem. Further, the assignee could not give a valid discharge for the debit to the original debtor unless expressly empowered so to do. Now it was in order to afford some remedy for this state of the law that subsection 6 of section 25 was passed. It is plain on reading it that it does not apply to every case of equitable assignment of a debt or chose in action [Chitty LJ in *Durham Brothers v Robertson* at pages 769 and 770].

The law on assignment is governed by section 4(3) of the Civil Law Act 1956 and it reads as follows:

> 'Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.'

The wordings of this subsection are in the same terms with section 25(6) of the Judicature Act 1873 which had since been replaced by section 136 of the Law of Real Property Act 1925.

It is common ground that if the assignment was an absolute one, not purporting to be by way of charge only, within the meaning of section 4(3) of the Civil Law Act 1956, then the appellant, as assignor was not entitled to sue in its own name but the action should be brought by the assignee (Public Bank) in its own name or by the assignee in the name of the assignor [*Read v Brown; Hughes v Pump House Hotel Co Ltd* and *Walter & Sullivan Ltd v J Murphy & Sons Ltd*].

[6] Seah FJ (as he then was), in delivering the judgment of the court, also made detailed references to the cases which were also considered in the *Hughes'* case. It is also necessary for the purpose of the present proceedings to refer to certain specific observations at p 270:

> It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor. While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within section 25 and the action must be brought in the name of the assignee [Mathew LJ. in *Hughes v, Pump House Hotel Co Ltd* (supra)]. Having stated the preliminary and before we examine the terms of the document of assignment dated February 18, 1978 we would dispose of a short submission of learned counsel for the appellant. It was contended that since the assignment was entered into following the execution of a loan agreement between the appellant and the Public Bank, the said assignment should not be read in isolation but should be read in conjunction with the said loan agreement. With respect, we do not agree. In our judgment and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of section 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.

[7] In the case of *Malayan Banking v PK Rajamani* [1994] 1 MLJ 405, the Supreme Court had to construe whether the purport of certain letters constituted a continuing overdraft facility or a new facility, and Mohamed Dzaiddin SCJ (as he then was), in delivering the judgment of the Supreme Court, held (at p 410):

In our view, the correct approach would be to look at the substance, not just the label which had been attached to the letter. The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance.

[8] This same approach was also applied in *BP (Sabah) Sdn Bhd v Sharikat Jubrin Enterprise* [1998] 4 MLJ 725, where reference was made not only *Nouvau's* case, but also two other cases by Richard Malanjun J (as he then was) where s 4(3) was also being considered in the following manner:

> …, I think I should now note some of the judicial pronouncements by our courts as regards the law on absolute assignment and s 4(3) of the 1956 Act. That section reads:
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> 'Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.'

In the case of *Khaw Poh Chhuan v Ng Gaik Peng* & Ors [1996] 1 MLJ 761, the court came to the conclusion that the assignment was absolute after considering what should be the proper construction of the documents before it. His Lordship Peri Swee Chin FCJ said this, at p 774:

> '... Therefore, on a true construction of the agreements, the question is this, was the beneficial Interest of the assignor in the estates of both the deceased father and the deceased mother transferred unconditionally to the assignee? If the answer is affirmative, the assignment is absolute.'

And his Lordship went on to say thus at p 775:

> '... In any event, compliance with s 4(3) is not a prerequisite to the validity of an assignment, which is to be determined in the usual ways. Even without complying with s 4(3), eg even without notice of the assignment to such debtors, for the sake of arguments, the assignment would have been valid in equity in any event against the assignor.
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> ... If an assignment is valid in law or legal (ie legally binding on the assignor), then it is valid or legal and compliance with s 4(3) is not essential to make it valid or legal as stated. Section 4(3) has not made any alteration in the law of assignment; it has merely made it easier for the assignee in one aspect in that the assignee can sue in his own name without sometimes having to borrow the name of the assignor or if the assignor is uncooperate, to join the assignor as a co-defendant.'

And in another case of *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365, his Lordship Chong Siew Fai CJ (Sabah & Sarawak) outlined the requirements of s 4(3) when he said this at pp 370-371:

'We have considered s 4(3) of the Civil Law Act 1956 referred to by counsel for both sides, The subsection lays down conditions for effecting absolute legal assignments. It is clear that the conditions are:

(1) that the assignment must be in writing under the hand of the assignor;

(2) that the assignment must be absolute and not by way of charge only; and

(3) that express note in writing must have been given to the person liable to the assignor under the assigned chose in action.'

If the assignment fulfills all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name.

As to the assignment in writing, no particular form is necessary but it must be absolute, ie one that purports to pass the entire interest of the assignor in the chose in action. Thus, in *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295, Jenkins LJ dealing with s 136(1) of the law of Property Act 1925 (English), the equivalent of which in our law is s 4(3) of the Civil Law Act 1956, said (at p 299 F-H):

'It is, no doubt, true that s 136(1) does not require any particular form of assignment, or that the notice given to the debtor should necessarily have been given by the assignee.The subsection does, however, clearly postulate that, whatever its form, there should be a document amounting to an absolute assignment by writing under the hand of the assignor. Given such an assignment, and given the requisite notice to the debtor, the assignment (to put it shortly) is to operate as a legal assignment of the debt in question.'

Looking at the deed of assignment dated 18 January 1983, we are convinced that the document, from the point of the wording or language therein used, is capable of constituting a valid assignment under s 4(3) of the Civil Law Act 1956. There is evidence that the deed dated 18 January 1983 was signed by a proper officer on behalf of the assignor, or at least there is no dispute or challenge to that. Thus, conditions (1) and (2) above are fulfilled.

[9] The plaintiff's counsel in the course of the written submission has cited the following paragraph in the Assignment of Receivables to state that the assignment is absolute:

Now therefore, for and in consideration of the foregoing premises, Assignor hereby assigns in assignment, the right to receive directly from the Pahang Government all payments as and when they become due and payable by the Pahang Government to the Assignor under the provision of the Main Contract with reference to the aforesaid sub-contract works from time to time to the extent of M$7,939,313.25 (hereinafter called 'the Payment').

[10] In my view, if this is the part of the provision that is to be relied on to establish that the assignment is absolute, it is indeed incomplete.

[11] As was stated by the Federal Court in *Nouva's* case, it is the four corners of the instrument that has to be examined, and attendant upon that, a further aspect of that instrument of 17 August, 1982 has to be detailed. It is pertinent to consider the following which appears in the Preamble to the Assignment of Receivables dated 17 August 1982:

Whereas the Assignor has subcontracted a portion of the Works to SYARIKAT BINARAYA, hereinafter called 'the Sub-Contract Works' specifically described as follows:

SUB-CONTRACT WORKS		REFERENCE (main contract pages attached)
Road No. B/2-	Jalan Sg. Koyan-Sg. Ular	Pages B.8, B-17-B, 18 & B.31
Road No. B/3-	Jalan Sg. Koyan-Tanjung Gahal	Pages B.9, B.19-B. 20 & B. 32
Bridge No. 2-	Bridge crossing Sg. Koyan At Felda Koyan Village	Pages B.43-B.47 & B.129-B.131
Bridge No, 3-	Bridge crossing Sg. Bertam	Pages B.48-B.52 & B.132-6,134
Bridge No. 4-	Bridge crossing Sg. Paga	Pages B.53-B.57 & B.135-B.137
Bridge No, 5-	Bridge crossing Sg. Ular	Pages B.58-B.62 & B.138-B.140
Bridge No. 6-	Bridge crossing Sg. Koyan at Tg. Gahal	Pages B.63-B.67 & B.141-B.143
Bridge No.12-	Bridge crossing No. 3.1	Pages B.93-B.97 & B.159-B.161
Bridge No.13-	Bridge crossing No.3.2	Pages B.98-B.102 & B.162-B.164
Bridge No.14-	Bridge crossing No. 3.3	Pages B.103-B.107 & B.165-B.167
Bridge No.15-	Bridge crossing No. 3.4	Pages B.108-B.112 & B.168-B.170
Bridge No. 16-	Bridge crossing No. 3.5	Pages B.113-B.117 & B.171-B.173
Bridge No. 17-	Bridge crossing No, 3.6	Pages B.118-B.122 & B.174-B.176

Whereas to facilitate billing and payment processes, the Assignor has agreed to assign to the Assignee, any moneys which are now or may hereafter be due and payable to the Assignor under the said Main Contract specifically in respect of the 'Sub-Contract Works' subject to the terms and conditions hereinafter contained and *which remaining amounts are* estimated as follows:

SUB-CONTRACT WORKS	ESTIMATED REMAINING SUM
Preliminaries	M$ 709,474.75
Road No. B/2	1,657,373.10
Road No. B/3	1,044,446.13
Bridge No. 2-6	1,528,846.92

Bridge No. 12-17		2.999.172.35
	TOTAL:	M$7,939,313.25

Now therefore, for and in consideration of the foregoing premises, Assignor hereby assigns in assignment, the right to receive directly from the Pahang Government all payments as and when they become due and payable by the Pahang Government to the Assignor under the provisions of the Main Contract with reference to the aforesaid Subcontract Works from time to time to the extent of M$7,939,313.25 (hereinafter called 'the Payment') *which sum is only provisional and subject to variations as provided for in the Main Contract, under the following terms and conditions to wit*:

1. *The billing procedure as established in the Sub-Contract Agreement, including without limitation, the verification and approval bv the Assignor of the monthly work accomplishment shall be strictly observed.* No billing shall be submitted to the government of Pahang without such approval.
2. The Assignee's right hereunder shall be restricted to the right to receive payments from the Pahang Government in respect of the said Contract with particular reference to the Works only. Any dispute arising out of the Main Contract shall not in any way affect this assignment, it being understood that the Main Contract is an agreement entirely between the Assignor and the Pahang Government.
3. Pursuant thereto, Assignor hereby authorizes the Assignee to sign any document evidencing receipt of such payment as required by the Pahang Government relative thereto,
4. The Assignee shall be entitled to a copy of the said Main Contract and all whatsoever documents evidencing any benefit or rights pertaining thereto that have been assigned herein,
5. The Assignor hereby appoints the Assignee's Manager for the time being in Kuantan as the Attorney in fact of the Assignor for them and in their names and on their behalf to enforce all rights and remedies specifically in respect of the payment for the Works under the Contract only and do all other things as full and eventually as the Assignor could do themselves in connection therewith. Such Attorney shall have the power to issue receipts referred to in par. 3 hereof for and on behalf of the Assignor.' (Italics for emphasis)

[12] References have also been made to *Keating on Building Contracts* (6th Edn), the paragraph of which is as follows:

> A sub-contractor who has entered into a contract with the main contractor to which the employer is not a party has no cause of action against the employer for the price of work done or goods supplied under his contract *unless he sues under a valid assignment*.

[13] The words 'unless he sues under a valid assignment' are the relevant words. *Treitel on the Law of Contract* (10th Edn) explained at p 626 that '[a]n assignment is not itself a contract between assignor and debtor: its legal nature is that of a direction amounting to the transfer of a right. It could also be an instruction to the debtor to pay to the third party.'

[14] In the present case, there is a written instrument of assignment of receivables as well as a notice. The remaining question is whether it is absolute as contended by counsel for the plaintiff and counsel has also relied on the *Hughes'* case (supra) to assert that it is so. *Hughes'* case was an action to recover Sterling 2788/ , an amount alleged to be the balance due under a contract entered between the plaintiff and defendant. At p 190–191 it is stated:

> A contractor for certain building works executed an instrument in writing by which, in consideration of bankers' continuing a banking account with him, and by way of continuing security to them for all moneys due or to become due to them from him on the said account, he assigned to them all moneys due, or to become due, to him from the building owners under the building contract, and he thereby empowered them on his behalf, and in his name, to settle and adjust all accounts in connection with the works, to give effectual receipts for the moneys thereby assigned, which should discharge the person paying the same from being concerned to see to the application thereof, and also, if necessary, to sue for, or take such other steps as they might think necessary for enforcing payment of the moneys thereby assigned, and he further thereby undertook at their request and his own cost to do and execute all such further acts, deeds, and things as they might reasonably require for giving full effect to the security thereby created. Notice in writing of this assignment was given to the building owners:
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> *Held,* that, the above-mentioned instrument having the effect of passing the whole right and interest of the assignor in the moneys payable under the building contract to the assignees by way of security, it was an absolute assignment (not purporting to be by way of charge only) within the meaning of the Judicature Act 1873, s 25 sub-s 6.
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> *Mercantile Banks of London v Evans*, [1899] 2 QB 613, distinguished.
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> .....
>
> The plaintiff on March 7, 1901, signed and gave Lloyd's Bank, Limited, the following instrument: 'In consideration of your continuing a banking account with me the undersigned, and by way of continuing security to you for all moneys due or to become due to you from me alone, or jointly with others, either on the said account or otherwise, I hereby assign to you all moneys due, or to become due, to me from the Pump House Hotel Company, Limited, of Llandrindod Wells, under or by virtue of a certain contract dated November 1, 1899, and made between the said company of the one part and myself of the other part (being a contract for completion of the new pump room and for making certain alterations and additions to the Pump House Hotel, Llandrindod Wells), and all other moneys, if any, due, or to become due, to me from the said company, including all moneys due, or to become due, for extras in connection with the works contemplated by the said contract; and I hereby empower you, on my behalf, and in my name, to settle and adjust all accounts in connection with the works and matters aforesaid, to give effectual receipts for the moneys hereby assigned, which shall discharge the person paying the same from being concerned to see to the application thereof; also, if necessary, to sue for, or take such other steps as you may think necessary for enforcing payment of the moneys hereby assigned, or any part thereof, and to compromise and settle any such proceedings on such terms as you may think fit, it being understood that all costs and expenses of recovering the E moneys hereby assigned are to be paid out of the amount recovered; and I hereby undertake at your request and my cost to do and execute all such further acts, deeds, and things as you may reasonably require for giving full effect to the security hereby created.

[15] In this case, the amount was the total amount due to the plaintiff as the balance of the contract price of work. In my view, the language expressed in the Assignment of Receivables requires further scrutiny. The relevant parts in addition to the provisions mentioned above are as follows (at paragraph 7):

> 7. The Assignor and the Assignee shall comply strictly with the terms and conditions contained in the Contract and the Sub-Contract Agreement in every respect and will execute and complete the various projects undertaken in the said contracts and shall do all other things and observe all conditions necessary to be done or observed in order to entitle the Assignee to the remuneration mentioned in the Main Contract with particular reference to the said Works only and will not permit or suffer any act omission or thing which may in any way preclude or hinder the Assignee from demanding the same free from all deductions or abatements that have been authorised and agreed upon in the Main Contract such as without limitation, the 5% retention on every monthly progress billing, liquidated damages, etc.

[16] I do not agree with the contention that the facts here are in *pari materia* with the situation in the *Hughes'* case. The amount due was of course specifically in reference to the sub-contract. According to the assignment the amount due and payable by the Defendant to the Assignor under the main contract was only provisional and was still subject to variations as provided for in the main contract with certain other stipulated terms and conditions.

[17] Also noted is the letter of 28 August 1982 where the Pejabat Pengarah Kerja Raya stated that it had no objection to the proposal of a 'partial' assignment. At this juncture I wish to refer to the case of *Malayawata Steel Bhd v Government of Malaysia & Anor* [1980] 2 MLJ 103 (PC) where the head note states:

> The appellants in this case had claimed payment of the sum of $215,618.68 being the balance of payment due for the supply of steel to a construction company for the Radio House project of the Government. The claim was based on an equitable assignment alleged to have been made in favour of the appellants with the construction company as assignor and the Government as the debtor. The Government had agreed to pay the cost of steel supplied directed to the appellants, after checking and certification by the construction company, but in some cases had paid the amounts due to the construction company. Both the learned trial judge and the Federal Court on appeal (see [1977] 2 MLJ 215] held that there had been no valid equitable assignment as payment was subject to a request or authorization by the construction company and the claim was dismissed. The appellants appealed.
>
> **Held:** there was here a valid equitable assignment of progress payments due to the construction company in so far as payment for the relevant steel supplied was due and outstanding and therefore judgment should be entered against the respondent Government for the amount claimed.

[18] At p 108 of the judgment Lord Russel of Killowen stated:

> The trial judge held that there was no equitable assignment in effect on the ground that the arrangement was subject to a condition that NKH should in respect of any

progress payment retain the ability to decide whether and to what extent they should instruct PWD to pay all or part of any progress payment to MSB, In the learned judge's view the correspondence in September 1968 amounted to this: that only after verification and checking by NKH were invoices to be forwarded to PWD: and that when forwarding the invoices NKH should indicate to PWD the amount to be deducted from its progress payment. Thus, he held the 'assignment' became conditional and severable and could not rank as an assignment. Their Lordships are of opinion that that conclusion is not correct; that what was arranged as to the checking and certification is not properly to be described otherwise as mere machinery for the operation of the equitable assignment constituted by the earlier agreement; and that there is no justification for the conclusion that NKH was to be at liberty to decide, otherwise than by the proper operation of that machinery, when and how much of any progress payment was to be paid direct to MSB. It is to be observed, as already noted, that the claim of MSB against PWD is established on the basis of certified invoices under the machinery. Moreover there was no question of consideration of the state of accounts pro and con between MSB and NKH. The learned judge found support for his opinion from the way in which affairs in fact later progressed. Their Lordships have already indicated that this is unsound ground upon which to dispute the character and scope of that A which had been earlier agreed in writing.

[19] In *Arab-Malaysian Merchant Bank Bhd v Boustead Trading (1985) Sdn Bhd* [1994] 1 MLJ 624, Abdul Malek J (as he then was) had also considered the question of assignments and in which he not only tabulated (at p 630) the difference between legal and equitable assignments, but also rendered the following explanation:

> Any assignment of a debt or other legal chose in action which does not fulfill these requirements will be valid in equity provided that the parties is clear and value is given. Such an equitable assignment need not be in writing. Notice to the debtor is not a necessary pre-requisite to the transfer of ownership; but notice is important in relation to competing interests. It is probable that notice to the debtor alone, provided that it was made with the knowledge of the assignee, would constitute an equitable assignment. An equitable assignment may be of part of a debt only or by way of a charge.
>
> However, whether an assignment is legal (in statutory A form) or equitable, provided that the substance of the transaction is for the outright sale and purchase of a debt, such assignment will have the effect of transferring ownership absolutely. The statute has in no way detracted from the efficacy of equitable assignments and the position in relation to them remains exactly as it was before 1973. The difference is purely procedural; the assignee has the right to sue in his own name alone for recovery from the debtor only if the assignment is legal. Otherwise proceedings should be in the joint names of the assignor and the assignee.

[20] In the case of *Khaw Poh Chuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 775, Peh Swee Chin FCJ (as he then was) held at p 775:

> The learned judge appears to be in error in suggesting as if there were two different distinct kinds of assignment, ie one in equity and one under s 4(3) of the Civil Law Act 1956, both assignments being mutually exclusive. Nothing is further from the truth. If an assignment is valid in law or legal (ie legally binding on the assignor), then it is valid or legal and compliance with s 4(3) is not essential to make it valid or legal as stated.
>
> Section 4(3) has not made any alteration in the law of assignment; it has merely

made it easier for the assignee in one aspect in that the assignee can sue in his own name without sometimes having to borrow the name of the assignor or if the assignor is uncooperative, to join the assignor as a co-defendant. It is instructive to read the observation and conclusion of Prof Furmston in Cheshire, Fifoot & Furmston *Law of Contract* (1987, 11th Ed) at p 498 in regard to s 136 of England's Law of Property Act 1925 which is in pari materia with our s 4(3); The statute has not altered the law in substance. It is merely machinery. It does not confer a right of action which did not exist before but enables the right of action that has always existed to be pursued in a less roundabout fashion.

[21] On the facts, the above case vested an equitable assignment. However as also stated by *Chitty on Contracts* (27th Edn) 19–005:

The test seems to be has the assignor unconditionally transferred to the assignee for the time being the sole right to the debt in question as against the debtor? If so, the assignment will be absolute;

[22] Here, there is not an absolute assignment of an unpaid balance of a debt; this is an assignment of a specified part of a debt.

[23] I do not agree that it could be said in the present case that the defendant/debtor is able to find out whether the sole right to the debt is that of the assignee from the documents in his possession. The defendant will not be able to ascertain whether there is still anything owed by the assignor to the assignee. This would entail the debtor having to investigate the state of accounts between the assignor and assignee.

[24] In the like manner, if the assignee were to sue the debtor, the court will not be able to ascertain to whom the debtor should pay without further investigating the state of accounts.

[25] Despite the existence of other provisions on receipts, and which purport to enable the assignee to undertake remedial measures, I hold the view that even more vital are the paragraphs on what parts of the debts are to be assigned.

[26] I therefore hold that the assignment is not an absolute assignment which falls within the provisions of s 4(3) of the Civil Law Act 1956 and, while it is an equitable assignment, it still does not entitle the plaintiff to bring an action against the defendant without the need of joining the Third Party.

Finding in favour of the defendant

Reported by Lim Lee Na